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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Docket No. 71-449

VAN MARK PRODUCTS CORPORATION and
EUGENE VAN CLEAVE,
Petitioners,
vs.
TAPCO PRODUCTS COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondent respectfully prays that the Petition for Writ of Ceritorari to review the judgment of the United States Court of Appeals for the Sixth Circuit Court in its cause No. 20,835 be denied.

I. GROUNDS FOR THIS COURT'S JURISDICTION

Contrary to Petitioners' assertion, jurisdiction cannot be conferred on this Court by United States Code, Title 28, Section 1251 (1) because this cause does not involve "controversies between two or more States" and does not involve the original jurisdiction of this Court. Perhaps Petitioners intended to assert jurisdiction under Title 28, Section 1254 (1) providing for review by Writ of Certiorari.

II. STATEMENT OF THE CASE

In view of the numerous inaccuracies, omissions, and unsupported contentions in the Petitioners' Statement of the Case, Respondent has restated the case and commented on such inaccuracies, omissions and unsupported contentions.

This is an ordinary suit for infringement of the Marsh Patent No. 3,161,223 brought by Respondent against its former employee, Petitioner Van Cleave, and former licensee, Petitioner Van Mark Products Corporation, which was organized by Van Cleave to produce infringing sheet metal bending brakes in competition with Respondent. This license resulted from settlement of a Wayne County Michigan Circuit Court suit against Petitioners for unfair competition and appropriation of trade secrets and provided for a royalty rate of 5½% and a $10,000 royalty prepayment. Due to Petitioners' failure to make such royalty payments, Respondent terminated the license and brought this action for patent infringement and other causes. No other Courts have considered the Marsh patent

and hence, there are no conflicting decisions with the Court of Appeals Opinion reversing the District Court and holding the Marsh patent valid and infringed.

A. The Marsh Patent in Suit and the Prior Art Rauen Patent

A sheet metal bending brake is a device with a clamping member (referred to by Petitioners as a "table"), an anvil for clamping sheet metal against the clamping member, and a bending member (referred to by Petitioners as a "bending leaf" or "leaf") hinged to the clamping member so that it can swung relative to the clamping member to bend the sheet metal about the anvil (R. 60-61). In the Marsh patent the hinge structure consists of intermeshed projections integral with and extending the entire length of the bending and clamping members with each projection having a flat top surface thereon lying in the plane of the flat surface of its associated bending or clamping member (R. 34-40, 257-258 and A. 4a). Claim 7 of the Marsh patent which defines this flat top hinge structure was found valid and infringed by the Court of Appeals and is set forth at page 10 of the Petition and A. 3a. This hinge construction with its specific configuration of projections is referred to by Petitioners as a "flat top hinge".

The brake of the Marsh patent (hereinafter "Marsh brake") is typically used on the job site by contractors for making right angle bends in painted coil stock for forming aluminum siding and particularly aluminum trim parts placed around windows, doors, and eaves of a house (R. 33). The Marsh brake produces a right angle bend in the sheet metal which is sharper, straighter, and more uniform without marring the painted sheet metal than the

bend produced by the Rauen type brake (R. 254-258). This is of great practical significance to contractors because homeowners are very critical and refuse to pay contractors who put marred and crooked aluminum trim pieces on their homes (R. 268).

The principal prior art reference is Rauen Patent No. 3,147,791 which was filed before the application for the Marsh Patent was filed. Prior to development of the brake of the Marsh patent, Lyf-Alum, Inc., manufactured the bending brake of the prior art Rauen patent which Respondent initially sold as a distributor and then as a manufacturer (R. 93-4, 111-12, 116-17 and A. 3a-8a). The Rauen type brake has a clamping member pivotally connected to the bending member by a separate piano hinge (referred to by Petitioners as a "round top hinge") bolted to the longitudinal edges of the members (A. 4a). This Rauen type brake was described as prior art in the Marsh patent as "a brake for bending and forming sheet metal such as aluminum coil stock may comprise a pair of members which are hinged to one another by a hinge such as a piano hinge having the leaves thereof fixed to the respective members" (Marsh patent, Col. 1, L. 9-13). The Marsh patent also indicates that making the round top piano hinge Rauen type brake in substantial length "not only results in an improper bend but, in addition, mars the surface of the sheet metal where it is coated with an enamel or other coating" (Marsh patent, Col. 1, L. 19-21). A sample of the brake of the Marsh patent was demonstrated to the Patent Office Examiner in charge of the Marsh patent application and was distinguished as prior art before claim 7 was allowed (R. 133-139).

B. The Unexpected Results Produced by the Hinge Structure of the Marsh Patent

Contrary to the assertion at page 7 of the Petition, neither the flat top hinge structure nor the unexpected results of an improved bend without marring produced thereby were old or known in the prior art. There is no support in the record for such a conclusion, the District Court made no such finding, and the Court of Appeals expressly found to the contrary (A. 12a, 13a-14a). Similarly, the contention at page 7 of the Petition that both lower courts "found that the mere substitution of an old integral hinge for the separate hinge was dictated by the prior art and was obvious" is inaccurate, overly broad and potentially misleading. The lower courts merely found that the substitution of an *integral* for a *separate* round top piano hinge (as used in the Rauen patent) would be obvious. However, the District Court did not specifically find that the use of the flat top hinge structure was dictated by the prior art or obvious and the Court of Appeals expressly found to the contrary (A. 13a-14a).

The Petition in discussing "a new function" at pages 4, 7, 8 and 13 usually does not clearly distinguish between the unexpected results of a sharper, straighter, more uniform bend without marring produced by the flat top hinge structure of the Marsh brake and the theory or theoretical analysis as to how or why such unexpected results are produced. This lack of clarity tends to create the unwarranted inference that such unexpected results were not fully disclosed in the Marsh patent and the proceedings in the Patent Office thereon. The Marsh patent expressly points out that with its specific flat top "hinge construction, an accurate bend is applied to the sheet metal without marring the surface of any coating on the sheet metal" (Marsh patent, Col. 2, L. 12-14). Moreover, these unexpected re-

sults were actually demonstrated to the Patent Office Examiner in charge of the Marsh application before the Examiner allowed claim 7 now in issue. During the demonstration, samples of sheet metal were actually bent on models of the prior art Rauen type brake with a separate round top piano hinge and the Marsh brake with an integral flat top hinge [R. 133-139, and File Wrapper of the Marsh patent (PX-5) at pages 21, 22 and 26]. In allowing claim 7, the Examiner implicitly acknowledged having observed the demonstration and the unexpected results produced by the Marsh brake saying in part:

> "At the recent demonstration of applicant's brake, it was impressed upon the Examiner that the new and unobvious results were obtained,..." (File Wrapper of the Marsh Patent quoted in part at A. 8a).

Thus, the unexpected results produced by the flat top hinge construction of the Marsh patent were pointed out in both the record of the Patent Office proceedings and in the Marsh patent itself and hence were not new thoughts injected at the trial by Dr. Youngdahl's* testimony as inferred by the Petition at page 8.

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* Respondent's expert, Paul F. Youngdahl, received his Bachelor, Master and Doctor degrees in Mechanical Engineering from the University of Michigan where he is a Professor of Mechanical Engineering, teaching courses in Machine Design. Dr. Youngdahl is a registered Professional Engineer, industrial consultant, and for more than 9 years, was the Director of Research and Design of a company which custom designs and builds conveyors and manufacturing machinery. Dr. Youngdahl has previously worked on several patent matters and at the time of trial, was on sabbatical leave working at the University of California in Berkley under a Ford Foundation grant developing a case study method for teaching machine design. Dr. Youngdahl is a member of the American Society of Mechanical Engineers, the American Association for Engineering Education, American Association for the Advancement of Science and the Michigan and National Societies of Professional Engineers (R. 26-31).

C. Dr. Youngdahl's Testimony

In uncontroverted testimony, Dr. Youngdahl testified that the brake of the Marsh patent produces a sharper, straighter, more uniform right angle bend in coated aluminum sheet metal than the prior art Rauen type brake with a separate round top piano hinge (R. 254, 256-258). Contrary to the implication at page 8 of the Petition, this testimony was based on and supported by uncontroverted tests in which Dr. Youngdahl actually used both the prior art Rauen type bending brake with a separate round top hinge (PX-18; R. 252) and the Marsh brake with a flat top hinge (PX-19; R. 252) to make right angle bends in flat painted sheets of aluminum coil stock (PX-16; R. 242 and -17; 245 respectively). Dr. Youngdahl offered to repeat these tests in open court for the benefit of the District Judge and Petitioners' counsel who declined the offer (R. 254-255).

Dr. Youngdahl also theorized that these unexpected results were produced by the Marsh brake because the integral projections of the flat top hinge more closely confined and supported the metal as the bending member approached the top or vertical position to take the kinks out of the sheet metal during the final portion of the bending process (R. 236-242, 271—quoted in part by the Court of Appeals at A. 4a-6a). Dr. Youngdahl also theorized that the Rauen type brake produces an inferior bend because the separate round top piano hinge leaves a groove or a gap between the clamping and bending members which results in less support and confinement of the sheet metal during the final portion of the bending process as the bending member approaches the vertical position (R. 236-242, 271). In presenting this theoretical explanation of the unexpected improved results, Dr. Youngdahl sketched a

free hand diagram on the blackboard which initially included the inaccuracy referred to at pages 7 and 8 of the Petition. On direct examination and without any prompting from counsel, Dr. Youngdahl noted and corrected this inaccuracy in his free hand diagram and indicated that his theoretical explanation was still applicable (R. 261-263), long before being cross-examined thereon by Petitioners' counsel. In discussing this inaccuracy on cross-examination, Dr. Youngdahl emphasized that his theory was only applicable to the final portion of the bending process as the bending member approached the vertical position (R. 271; A. 6a).

D. Demonstration by Petitioners' Counsel

At the close of the trial after Dr. Youngdahl was excused by the District Court and no longer available as a witness, having left to return to California, Petitioners' counsel made some bends in flat sheet metal using the Marsh brake (PX-19; R. 252) and the prior art Rauen type brake (PX-18; R. 252) which were observed by the District Court at the request of Petitioners' counsel (R. 358-368). On the basis of these bends, Petitioners' counsel argued to the District Court that Dr. Youngdahl's theoretical analysis was incorrect and should not be believed (R. 365). Respondent's counsel immediately objected to this argument pointing out to the District Court that these were only *partial* bends illustrating only the beginning of the bending process, and therefore, were not inconsistent with Dr. Youngdahl's theoretical analysis of what occurs in the final portion of the bending process as the bending member approaches the top or vertical position (R. 367). It is uncontroverted and was not denied by Petitioners' counsel that these were only *partial* and not *complete*

bends. The fact that these were only partial bends was not established by sworn testimony because Petitioners' counsel was not a sworn witness subject to cross-examination. Since Petitioners had the burden of proof on this question, it was not incumbent on Respondent's counsel to conduct further demonstrations as contended in the Petition at pages 4 and 5. Moreover, whether Dr. Youngdahl's theoretical analysis was correct does not affect his uncontroverted tests (R. 254-258) in which he made complete right angle bends showing the unexpected results produced by the flat top hinge structure of the Marsh patent.

E. The District Court Opinion

A perusal of the District Court's opinion demonstrates that it failed to apply the correct legal test for patentability of *Graham v John Deere*, 383 US 1 (1966), and to make the probing inquiries and detailed factual analysis required thereunder. The District Court did not give any detailed consideration to the prior art or make any determination of the scope and content thereof, rather it merely referred very briefly to two of the prior art patents (A. 27a). Similarly, the District Court merely quoted portions of the claims in the Marsh patent (A. 24a-25a) rather than making the detailed analysis of the differences between the prior art and the subject matter defined by the claims as required by *Graham*. Moreover, the District Court failed to determine the level of the ordinary skill in the pertinent art.

The District Court also failed to apply the correct legal test in attempting to determine whether the claims of the Marsh patent reasonably defined the structure of the flat

top hinge as required by 35 U. S. C. 112. When the finding relied on by Petitioners as to Dr. Youngdahl's theory is read in context (A. 29a-30a), it is evident that the District Court was trying to determine as a matter of law whether the claims reasonably defined the structure of the flat top hinge as required by 35 U.S.C. 112. Since claims must define structure, not theory, this finding is totally irrelevant to whether the claims comply with 35 U.S.C. 112. Hence, this finding is not subject to the usual "clearly erroneous" criterion since the District Court applied the wrong legal criteria in making such finding.

F. The Opinion of the Court of Appeals

The Court of Appeals in its opinion implicitly agreed that the District Court neither applied the correct legal test for patentability laid down by this Court in *Graham v John Deere* nor applied the correct legal test under 35 U.S.C. 112. Thus, the Court of Appeals in its Opinion carefully applied the correct legal test of *Graham* and thoroughly evaluated all of the evidence of record in holding the Marsh patent valid and infringed.

The Court of Appeals found that the pertinent prior art was the broad category of "machine design" (A. 13a) and, after fully probing and meticulously analyzing the prior art, found that the difference between the prior art references and the brake defined by claim 7 of the Marsh patent was the flat top hinge structure with intermeshed projections, each having a flat top surface in the plane of the flat surface of its corresponding bending and clamping members providing a sharper, straighter, more uniform bend in sheet metal without marring (A. 11a-14a). The Court of Appeals also found that such a flat top hinge structure producing these unexpected results was

beyond the level of ordinary skill in the pertinent art and thus concluded that claim 7 of the Marsh patent defines unobvious subject matter (A. 13a-14a).

Contrary to the assertion at pages 12 and 13 of the Petition, the Court of Appeals, in so holding, merely noted that under its prior decisions Petitioners may have been foreclosed from challenging the utility of such unexpected results produced by the flat top hinge structure and then proceeded to fully evaluate the evidence on this issue and determine whether Petitioners sustained their burden of proof (A. 15a-18a). The Court of Appeals found that "there is no testimony in the record to refute Dr. Youngdahl's theories" (A. 7a), gave little weight to the bends made by Petitioners' counsel "who was not sworn as a witness and did not qualify as an expert" ((A. 17a), and held that "the unsworn, self-serving statements of [Petitioners'] counsel are not evidence". (A. 18a). The Court of Appeals also found that "since Dr. Youngdahl's testimony was directed to the 'critical' final stage as the bend approached the vertical, the demonstration by defense [Petitioners'] counsel, which embodied only partial bends, logically cannot credit nor discredit Dr. Youngdahl's testimony" (A. 16a). Thus, the Court of Appeals found that Petitioners failed to sustain their burden of proof, and that the District Court's finding was "clearly erroneous" since there simply was not any credible evidence in support thereof. Particularly, since Petitioners did not accept Dr. Youngdahl's offer to reconduct in open court the tests on which his testimony was based (R. 254, A. 17a).

G. The Order on Petition for Correction and Rehearing

In moving for a rehearing, Petitioners expressly argued in the Court of Appeals, as they do in this Court, that the District Court's finding was not "clearly erroneous" and, thus, should not be reversed. The Court of Appeals fully evaluated and rejected this argument emphasizing that it had previously said in its Opinion that Petitioners "had full opportunity to offer evidence to refute the testimony of Dr. Youngdahl, but they failed to do so", that the partial bends made by Petitioners' counsel "should have been made as part of the cross-examination of Dr. Youngdahl, or at least could have been supported by sworn testimony of witnesses with the right of plaintiff [Respondent] to cross examine", and that "the unsworn self-serving statements of counsel are not evidence" (A. 20a-21a). The Court of Appeals also emphasized that, as Petitioners "apparently recognize the burden of proving invalidity rested upon them" (A. 21a) and implicitly concluded as a matter of law that Petitioners failed to sustain their burden of proof on this issue and that the District Court's finding was unsupported by any evidence and thus "clearly erroneous".

For the first time Petitioners also contended that it was "physically impossible" for the flat top hinge of the Marsh brake to support the sheet metal during bending. In support of this contention, Petitioners for the first time asked the Court of Appeals to view and demonstrate to itself the Rauen type and Marsh brakes and to examine photographs, taken after its decision was announced, of an *ex parte* demonstration of bending sheet metal on these brakes. The Court of Appeals declined to do so since there is no authority permitting "*ex parte* experiment or demonstration after the case had been argued and decided", Petitioners made no request "for permission to conduct

a demonstration . . . prior to our decision of the case" and the photographs "are not in evidence in the case and cannot be considered by us" (A. 20a). Contrary to the contention at pages 4, 5, 7, 8, 9, 10, 12, 13 and 14 of the Petition, the Court of Appeals certainly did not err in refusing to view and operate the bending brakes in the absence of both parties and counsel since Petitioners failed to ask the Court of Appeals to do so before it decided this cause. Also, there is no support whatsoever in the record for the contention at pages 4, 11, 12 and 14 of the Petition that it is "physically impossible" for the flat top hinge structure to support the sheet metal during bending.

III. REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

This is a common, ordinary, garden variety patent infringement suit which does not have any substantial impact on any large industry or any substantial portion of the Commerce of the United States because the Marsh brake is sold in competition with other sheet metal bending devices including the Rauen brake manfactured by Lyf-Alum, Inc. (R. 338-339) and because as found by the Court of Appeals infringement of the Marsh patent can be readily avoided since the claims are very narrow and specific. (A. 9a-10a). Moreover, Petitioners do not seek review of any questions of substantive Federal Patent Law whatsoever and there are no conflicting Court of Appeals decisions involving either the Marsh patent or the question presented for review by this Petition for Writ of Certiorari. Therefore, granting of this Petition will not result in the consideration of any important, unsettled or conflicting questions of patent law or Federal Rules of Civil Procedure, or of any issue of paramount public importance or of substantial effect on commerce.

At most, Petitioners simply seek a review of a specific application by a Court of Appeals of a settled, established, well-known, and widely accepted Rule of Federal Civil Procedure that "findings of fact shall not be set aside unless clearly erroneous". Since any determination of this question is completely dependent on and intertwined with the specific facts of this patent infringement suit, a resolution thereof by this Court would have little, if any, value as a precedent for guiding the future decisions of the Courts of Appeals. Moreover, the Court of Appeals in its Order on Rehearing expressly reviewed its own application of Rule 52 and, thus, Petitioners merely seek reconsideration thereof by this Court. Therefore, granting of this Petition for Writ of Certiorari will not lead to the resolution of any important or unsettled questions of Federal Procedure or result in a decision having any substantial impact on the judicial administration of the jurisprudence of the United States.

As discussed in detail hereinafter, a perusal of the Opinion and the Order on Rehearing of the Court of Appeals will demonstrate "beyond a shadow of a doubt" that rather than departing from the accepted and usual course of judicial proceedings, the Court of Appeals strictly followed both the rules of evidence and procedure applicable in this cause and the strict requirements for patentability laid down by this Court in *Graham v John Deere.* In short, the applicable statutory and case law make it evident that the Court of Appeals would have been remiss in its duty if it had not exercised its own supervisory power in reversing the District Court and certainly has not pursued a course of action warranting the exercise of this Court's power of supervision.

The District Court's finding is "clearly erroneous" and was properly disregarded because as the Court of Appeals

clearly found there was no credible evidence in support thereof. The underlying assumption of the main argument of the Petition is that the bends made by Petitioners' counsel showed that the sheet metal is unsupported and, therefore, conflicted with and tended to refute Dr. Youngdahl's theoretical explanation of the unexpected results of an improved bend without marring produced by the Marsh brake. This underlying assumption is utterly without any basis in the record and such lack of evidence is implicitly admitted by the attempted use of the subsequently taken photographs in the Petition for Correction and Rehearing.

Under well established rules of evidence the argumentative, unsworn, self-serving statements and observations of Petitioners' counsel is not evidence and "as counsel's ipse dixit it is valueless": *Contour Saw, Inc. v. L. S. Starrett Co.* 128 F2d 314, at 317 (5th Cir. 1971) rehearing denied—F2d —, 166 USPQ 1 (1970). Hence, the District Court committed reversible error in relying so heavily on the bends of Petitioners' counsel. Moreover, as the Court of Appeals found (A. 17a), the well-established rules of evidence do not sanction giving more weight and credibility to the unsworn statements and demonstrations of Plaintiffs' counsel who is not qualified as a technical expert than to the sworn testimony based on actual tests of Dr. Youngdahl who is a fully qualified technical expert with many years of teaching, consulting and supervisory job experience in the pertinent art of mechanical machine design and who is a registered Professional Engineer (R. 26-31). Finally, it is the well-established statutory (35 U.S.C. 282) and case law that issued patents are presumptively valid and Petitioners had the burden of proving with clear and convincing evidence that the brake of the Marsh patent did not produce the unexpected results

of a sharper straighter more uniform bend without marring. Therefore, the Court of Appeals was fully justified in finding as a matter of law that Petitioners did not sustain their burden of proof and that the District Court's finding was "clearly erroneous" since it was not supported by and credible evidence and was refuted by the testimony of Dr. Youngdahl. Hence, the District Court committed reversible error in holding the Marsh patent invalid. This conclusion is particularly justified since Petitioners failed to accept Dr. Youngdahl's offer to reconduct in open court his tests (R. 254, A. 17a), and also failed to accept the continuance or stay of trial offered by the District Court (R. 249) for preparation of evidence refuting Dr. Youngdahl's testimony.

Moreover, it is evident from the District Court's opinion that it committed reversible error by failing to apply the correct legal test of patentability under 35 U.S.C. 103 laid down by this Court in *Graham v John Deere*, including failing to make the probing factual inquiries and detailed analysis required thereunder. It is also self-evident that the District Court failed to comprehend and apply the correct legal test of 35 U.S.C. 112 when making the finding now relied on by Petitioners. Since the District Court failed to apply the correct legal standards or tests, its finding is not subject to or controlled by the "clearly erroneous" criterion of Rule 52 of the FRCP: *Toro Mfg. Corp. v Jacobson Mfg. Co.* (CA7th, 1966) 357 F2d 901, 903; *Tidewater Patent Dev. Co. v. K. M. Kitchens* (CA 4th, 1966) 371 F2d 1004, 1006, cert. denied (1967) 389 US 821. Thus, the Court of Appeals was fully justified in reversing the District Court for failure to apply the correct legal standards and in fully evaluating all of the evidence of record.

The contention at pages 4, 11, 12 and 14 of the Petition that it is "physically impossible" for the flat top hinge structure of the brake of the Marsh patent to support the sheet metal during bending is utterly without any support whatsoever in the record. This is simply an afterthought which was baldly asserted by Petitioners' counsel for the first time in the Petition for Correction and Rehearing and was properly rejected by the Court of Appeals since it was not supported by any evidence in the record of this cause (A. 20a). Likewise, the assertion at pages 9 and 13 of the Petition that the Court of Appeals only considered the direct and ignored the cross-examination testimony of Dr. Youngdahl is without merit since the Opinion quotes and analyzes his cross-examination testimony at A. 6a-7a.

The contention at pages 4, 7, 8 and 11 of the Petition that the patent claims, patent specification, Patent Office records, and the inventor did not disclose the "function" or theory that additional support is provided for the sheet metal by the flat top hinge structure of the Marsh patent is totally irrelevant as a matter of law. Similarly, the contention that the inventor developed the flat top hinge structure of the brake of the Marsh patent without appreciating the theory of additional support provided during the final portion of the bend is totally irrelevant as a matter of law. These contentions were fully and correctly evaluated by the Court of Appeals in its Opinion when it said at A. 18a that:

The Statute provides:

> "Patentability shall not be negatived by the manner in which the invention is made." 35 U.S.C. 103.

Nor do the statutes require that an inventor understand and disclose the theory of his invention. He is entitled to all of the benefits of his invention even though they were greater than he believed. Dellers Walker on Patents, 2d Ed., Vol 4, §283, pp. 106, 107.

These contentions are particularly irrelevant here since the Marsh patent fully discloses and describes the flat top hinge structure and specifically points out that such structure provides an improved bend without marring and the claim in issue narrowly and specifically defines the flat top hinge structure. As this Court stated in *United States v Adams,* 383 US 39, 49 (1966) "it is fundamental that claims are to be construed in the light of the specifications and both are to be read with a view to ascertaining the invention".

Petitioners erroneously contend at pages 12 and 13 of the Petition that they were barred from challenging the utility of an improved bend without marring. Rather a perusal of the Opinion of the Court of Appeals at A. 15a-18a demonstrates that it merely noted that under its prior decisions Petitioners may have been so barred and then proceeded to fully evaluate all of the evidence and materials presented on this issue. Moreover, it is conceded at page 13 of the Petition that "this point need not be considered in this Petition, . . .". Furthermore, it is submitted that this issue is not fairly comprised in the question presented for review as required by Rule 23.1 (c) of this Court and therefore, is not properly before this Court.

It ill behooves Petitioners to contend at pages 4, 5, 12 and 13 of the Petition that the Court of Appeals erred by not examining and demonstrating for itself the Rauen and Marsh type sheet metal bending brakes when Peti-

tioners utterly failed to ask the Court of Appeals to do so before it handed down its Opinion in this cause. As noted by the Court of Appeals, Petitioners did not even request permission to demonstrate the brakes at the oral argument on appeal (A. 20a). Certainly, it was not error or an abuse of discretion for the Court of Appeals to refuse to do so in connection with the Petition for Correction and Rehearing where neither the parties nor counsel would be present during such a demonstration. In fact it would have been highly "unorthodox" (A. 20a) for the Court of Appeals to go outside of the record in this cause and independently experiment with and perform tests on the Rauen and Marsh type bending brakes. There is no case or statutory law sanctioning such a procedure. To allow Petitioners to retry this case piecemeal by requiring the Court of Appeals to conduct for itself such demonstrations at this late date as urged on page 14 of the Petition would obstruct orderly judicial procedure and be a travesty of justice. Petitioners have had their day in court and orderly judicial administration requires that this cause be terminated; particularly since Petitioners have not shown that such demonstrations could not have been performed either at the trial or hearing on Appeal and Petitioners declined the District Court's offer to grant a continuance for such purpose (R. 249).

IV. CONCLUSION

For the above reasons this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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